No. 90-970

In the
Supreme Court of the United States

OCTOBER TERM, 1990

LECHMERE, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief *Amicus Curiae* of the International Council of Shopping Centers, Inc., in Support of Petitioner

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This brief is respectfully submitted on behalf of the International Council of Shopping Centers, Inc., as *amicus curiae*. Pursuant to Rule 37.2 of the rules of this Court, ICSC has obtained and filed the written consent of each of the parties to the filing of this brief. ICSC supports the position of the petitioner in this case and urges that the decision below be reversed.

Identity and Interest of Amicus Curiae

The International Council of Shopping Centers, Inc. (hereinafter referred to as ICSC), is a not-for-profit corporation organized under the Not-for-Profit Corporation Law of the State of Illinois. ICSC has approximately 26,500 members worldwide and approximately 24,000 in the United States.

ICSC is the trade association for the shopping center industry. Its members, including developers, owners, retailers, lenders and all others having a professional interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. It represents almost all of the 37,000 shopping centers in this country and is the only U.S. trade association specific to shopping centers.

ICSC members have a clear interest in the disposition of the present case because the holding of the First Circuit Court of Appeals enforcing the order of the National Labor Relations Board (NLRB) would replace the long-standing rule established in *Babcock & Wilcox*[1] with a new standard which would virtually obliterate private property rights, shift the burden of proving that there are no reasonable alternative means to disseminate a union's message to employees from the union to the employer, and sanction the NLRB's change in policy without a reasoned analysis.

Reference is made to the brief of the petitioner for a statement of the facts of this case and the applicable statutes. This brief will be confined to the aspects of the case specifically related to shopping centers.

ARGUMENT

POINT I

The *Babcock* rule is the applicable standard in determining whether a union must be granted access to private property and the First Circuit erred in allowing the Board to invert, and effectively overrule, *Babcock*.

In *NLRB v. Babcock & Wilcox*,[2] this Court clearly enunciated the circumstances under which private property

[1] *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

[2] *Id.*

rights yield to the right of employees to organize. "An employer may post his property against nonemployee distribution of union literature" unless (1) reasonable efforts by the union to reach employees with the message fail (*i.e.*, if the location of the employer and living quarters of employees place employees beyond the reach of reasonable efforts of the union to communicate with them) or (2) the employer discriminates against the union by allowing other distribution. Thus the Court has established that the employer/property owner's right is paramount and may not be disturbed unless either the union cannot reach the employees or the employer discriminates against union distribution of literature.[3]

There is no question that the property owner in the instant case did not discriminate against the union. It promulgated and enforced uniform no-solicitation rules. The issue then is whether the union was able to reach the employees by alternative means, whether the "inaccessibility of employees [made] ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels . . . ."[4] Reasonable efforts include personal contact on streets or at home; telephone contact, letters, or advertised meetings.[5] *See also Monogram Models, Inc.*, where the Board refused to establish distinct rules for reaching employees in large metropolitan areas.[6]

The Board itself has stated that "[i]t [was] not unreasonable to expect a union to try to reach employees at their homes by telephone, even if they do live in a large metropolitan area."[7] It further suggested banners on public property, in-plant committees of employees, and employee

[3] *Id.* at 112.

[4] *Id.*

[5] *Id.* at 111.

[6] 77 LRRM 1913 (1971).

[7] *Falk Corporation*, 1971 CCH NLRB ¶23, 371 at 30, 209, 192 NLRB No. 100.

distribution of literature in the workplace.[8] In *Dexter Thread Mills*,[9] the union had met with little success in making home contact, but had initially copied down license plate numbers on cars entering the parking lot before 9:00 a.m. The Board recommended that the union pursue that method further, and were not convinced that there were not "reasonable, albeit perhaps more expensive and less convenient means of reaching employees." [10]

In the case at hand, the union did not fail to reach employees: it had contacted 20% of them through the mail; had secured addresses by copying license plate numbers and had made home visits; had placed five advertisements in local newspapers; had distributed handbills; and had picketed on public property. Judge Torruella's dissent in the decision below thoroughly analyzes the effective means available to the union with which to reach the targeted employees and compares these methods to those in the *Babcock* case.[11] The decisions below confuse *access* with *success*. The union did not even exhaust all the alternative means at its disposal. Significantly, it did not utilize the one individual who *did* respond positively to its efforts by having that employee meet with his fellow employees or distribute literature to them.

Jean Country[12] and its progeny have perverted the Supreme Court's unambiguous pronouncement to allow access to private property only if there is a "clear showing . . . that reasonably effective alternative means were unavailable in the circumstances." The Board has created a presumption in favor of the union which the property owner must overcome in order to defend his right to

[8] *Id.*

[9] 81 LRRM 1293 (1972).

[10] *Id.* at 1295

[11] *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 326-327 (1st Cir. 1990).

[12] *Jean Country*, 291 NLRB No. 89, 1988-89 NLRB Dec. (CCH) ¶15,118 (1989), 132 LRRM (BNA) 1329 (1989).

control the use of his property. We respectfully submit that this perversion should not be allowed and that this Court affirm the Babcock rule.

POINT II

This Court should uphold the primacy of private property rights over dilution by the Board.

"The [National Labor Relations] Act requires only that the employer refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available." [13] Thus did this Court establish that no affirmative actions were required of an employer or property owner in order to comply with the dictates of the Act. As long as other channels were available for the exercise of employees' rights—and, in the instant case they were—an employer is not obliged to open his property for the use of the union. As discussed above, the employer/property owner's rights may only be infringed in extreme circumstances. These rights are not diluted, as the Board in *Jean Country* stated, by "certain quasi-public characteristics." [14]

The court below gave very little weight to private property interests of the shopping center and its tenants. The court said that the "Petitioners' property interest was diluted by the public nature of the parking lot and the nonexclusivity of its use." [15] This led the circuit court to the conclusion that the trespass was "minimally intrusive." [16] This interpretation of the intended use of the parking lot ignores the business context of the property rights at issue: the public is invited to use the lot only while they patronize the tenants in the center. In fact

[13] *Babcock, supra*, n.1 at 113-114.

[14] *Jean Country, supra*, n.12 at 28, 386.

[15] 914 F.2d 313 at 321.

[16] *Id.* at 323.

many centers tow away unauthorized vehicles at the owner's expense.

A shopping center is a group of retail stores and related business facilities, the whole planned, developed, operated and managed as a unit.[17] Tenants are selected in order to provide a mix of services to attract customers, with each tenant enhancing the business of the others, to provide a synergism which makes the whole greater than the sum of its parts.[18] Accordingly, any interference in the business of one tenant inevitably affects the business of the other tenants. Thus the distribution of handbills related to a labor dispute presents the shopping center and its tenants with precisely the same problems as the distribution of handbills relating to political matters.

Although this Court in *Hudgins*[19] said that labor matters are governed by the National Labor Relations Act, in balancing the property rights under this Act, the Court should consider the line of cases which protect shopping centers from the unwanted distribution of political handbills. This Court in *Pruneyard v. Robbins*[20] held that a state could require a shopping center to permit political activities on its private property under reasonable rules and regulations without violating a center owner's federal constitutional rights. This made the issue of public access for political activities a state matter. Since *Pruneyard*, however, supreme courts in the states of North Carolina,[21]

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[17] Carpenter, *Shopping Center Management*, 3rd ed. ICSC, New York (1984), p. 2.

[18] Roswick, McEvily, *"Use Clauses in Shopping Center Leases: The Effect of the Tenants Bankruptcy,"* 14 R.E.L.J. 3, 6 Summer 1985.

[19] *Hudgins v. National Labor Relations Board*, 424 U.S. 507 (1976).

[20] 447 U.S. 74, 100 S.Ct. 2035 (1980).

[21] *State v. Felmet*, 302 N.C. 173, 273 S.E. 2d 708 (1981).

Connecticut,[22] Michigan,[23] New York,[24] Pennsylvania,[25] Wisconsin,[26] Washington[27] and Georgia[28] have upheld the private property rights of shopping center owners to prevent the distribution of handbills and the conduct of other political activities. In adopting the reasoning of this Court in *Lloyd Corporation v. Tanner*,[29] the Georgia Supreme Court, in the most recent state supreme court case addressing the issue, rejected the argument that shopping malls are "the new town centers" and stated: "This court recognizes that shopping malls represent a fertile potential source of signatures for petitioners in a recall election effort. *Petitioners' convenience*, however, does not create a constitutional right of access to private property for political activity."[30] Thus, not only this Court, but eight state supreme courts, when faced with treating private property like public property, have refused to dilute private property rights in favor of public—even constitutionally significant—issues.

Furthermore, shopping centers oppose the right of non-employees to enter upon and use private property for the purpose of organizing employees where there are alternative means of communicating with the targeted employees because

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[22] *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984).

[23] *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W. 2d 337 (1985).

[24] *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 498 N.E.2d 1211 (1985).

[25] *Western Penn. Socialist Workers 1982 Campaign v. Connecticut General Life. Ins. Co.*, 512 Penn. 23, 515 A.2d 1331 (1986).

[26] *Jacobs v. Major*, 193 Wisc. 2d 492, 407 N.W.2d 832 (1987).

[27] *Southcenter Joint Venture v. National Democratic Policy Committee, et al.*, 113 Wash. 2d 413, 780 P.2d 282 (1989).

[28] *Citizens for Ethical Government, Inc. v. Gwinnett Place Associates*, 260 Ga. 245, 392 S.E.2d 8 (1990).

[29] 407 U.S. 551 (1972).

[30] *Citizens for Ethical Government, Inc. v. Gwinnett Place Associates, supra*, n.28 (emphasis added).

of the risk of significant interference with the business of the center. The other tenants of the shopping center, who are neutral to the dispute, may suffer economic hardship as a result of the nonemployees' presence.

As stated above, the synergistic interrelationships of the tenants in a shopping center are a unique and critical aspect of the enterprise. Any disruption of the business of one tenant reduces traffic to the center and damages all the businesses in the center.

There have been two judicially documented cases of economic harm from forced public access to shopping centers. In the *Cologne* case, *supra*,[31] the lower court had permitted the National Organization of Women to solicit signatures on petitions. The Ku Klux Klan then announced that it would come to the mall to solicit membership. When members of the Klan appeared, the mall denied them entrance, and they left peacefully. Subsequently, a number of anti-Klan demonstrators appeared and engaged in a heated demonstration, and a confrontation which could only be described as a riot occurred. Several stores in the mall had to close for a portion of the day. The interference with business was clearly established. These events were described in a Memorandum of the Superior Court, dated August 13, 1983. (Copy annexed for the convenience of the Court.)

The second incident occurred in the Wisconsin mall involved in the *Jacobs* case, *supra*.[32] There, a group of dancers performed a symbolic dance about nuclear war, concluding with a "die in" in which bystanders were invited to join the dancers in lying motionless on the floor for several minutes. The court found that several stores within the mall suffered an identifiable reduction in sales that day.

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[31] *Cologne v. Westfarms, supra*, n.22.

[32] *Jacobs v. Major, supra*, n.26.

Even without violent or dramatic events, financial harm to uninvolved parties is inevitable as a result of access for political or labor-related activities. Consequently, all the tenants in a shopping center are affected by events which involve one of the tenants, whether it is a bankruptcy, a demonstration, or a union activity.

Although it may not be as incendiary as a Ku Klux Klan demonstration, a union activity may spark counter-demonstrations or at least excite controversy. Consider, for example, the recent events surrounding the *New York Daily News*.

It is not a court's function to try to determine whether or not a particular kind of public access is the type which may result in economic harm to the targeted shopping center. The fact is that public opinion polls conducted by the ICSC and others have produced virtually uniform results showing that many individuals are negatively affected by noncommercial activity at shopping centers. The results of a recent Gallup Poll sponsored by the ICSC to survey the public's attitudes regarding access to shopping centers indicated that roughly half (49%) of those who responded felt that public access decisions should be left to the management of the center and an additional 21% wanted management to keep all groups out of centers.[33]

These are individuals who will avoid the part of the center where the activity occurs or will avoid the mall altogether and shop elsewhere.

The interference with commercial activity is directly proportional to the level of controversy surrounding the group, but polls indicate that there is always a small percentage of shopping center patrons who are concerned even with noncontroversial groups. Consequently, the rights of neutral parties, *i.e.*, the other shopping center

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[33] ICSC Research Bulletin, Vol. 2, Number 2, ICSC, New York (1991) p. 1.

tenants, are infringed when nonemployees come onto private property for noncommercial reasons.

ICSC submits that the court below failed to give proper weight to the impact of the trespass by finding it "minimally intrusive."

CONCLUSION

For the reasons set forth above, the International Council of Shopping Centers, as *amicus curiae*, supports the petitioner and respectfully requests this Court to reverse the First Circuit's erroneous decision.

Respectfully submitted,

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Memorandum of Decision of Superior Court, Judicial District of Hartford-New Britain at Hartford in *Cologne vs. Westfarms Associates*

No. 274171

CHRISTINE A. COLOGNE, ET AL	:	SUPERIOR COURT
VS.	:	JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT HARTFORD
WESTFARMS ASSOCIATES	:	

AUGUST 13, 1983

MEMORANDUM OF DECISION
ON
MOTION TO DISSOLVE INJUNCTION

The named plaintiff in the above-entitled matter together with the Connecticut Chapter National Organization of Women, by complaint dated July 15, 1982 sought injunctive relief against the defendants who, as owners of premises commonly known as Westfarms Mall, denied access to such premises to the plaintiffs. The plaintiffs claimed a right to enter the Mall for purposes of soliciting signatures on petitions and other activities consistent with their general aims and objectives. The plaintiffs based their claim of right on the constitutional rights of liberty of speech and assembly. Article First, Sections Four and Fourteen, respectively, Constitution of the State of Connecticut as well as Article First, Section Twenty, the equal protection clause, on the grounds that while the defendants allowed some groups access for purposes of disseminating information on public matters, other groups, and particularly the plaintiffs, were denied the equivalent right. After a lengthy hearing, Spada, J., issued a memorandum of decision on February 28, 1983 affirming the plaintiffs claim and establishing for at least this case constitutional rights in favor of the plaintiffs for their use of the defendants private premises. The memorandum of decision,

however, did not recognize unfettered constitutional rights but rather strictly circumscribed the exercise of the plaintiffs rights by several restrictions including time, place and manner for the conduct of their lawful activities.

This decision embodied in the judgment of March 2, 1983 thus becomes the law of this case pending the disposition of the appeals from the judgment as on file.

The present motion to dissolve the injunction was filed by the defendants on May 25, 1983 and was occasioned by a certain series of incidents which occurred on May 22, 1983 and immediately prior thereto. The evidence presented in support of the motion established that the Klu Klux Klan shortly prior to May 22, 1983 sought permission to utilize the premises for their own purposes of public information equating their claimed right of access as equivalent to the plaintiffs. While the defendants denied the request and subsequently the K.K.K. acquiesced in that decision, two other groups somehow acquired the information that the K.K.K. would be on the premises at noon or thereabouts on May 22, 1983 and appeared to conduct a counter-demonstration. This resulted in a confrontation between these groups and the police forces who were on or near the premises in anticipation of the Klan activities. While the situation was brought under control it was not done so without a considerable protracted disturbance as recorded by police video cameras as well as local television camera coverage. Several persons were injured, there was considerable financial loss and disruption to business tenants of the defendants, not only during the demonstration but during the entire day as demonstrated by comparative income figures offered through witnesses for the defendants. Additionally, customers of G. Fox & Co. were treated to the spectacle of police in full riot gear together with at least one police dog removing one of the demonstrators across the sales floor. The main entrance doors to the G. Fox sales premises were locked during the period of the confrontation which was in excess of an hour thus

eliminating a major exit route to persons inside the premises should the need arise. Police witnesses expressed the opinion that had this confrontation occurred inside the mall the results would be uncontrollable and disastrous in terms of potential physical injury to police, customers and tenants and their employees as well as damage to property.

There can be no dispute under Connecticut law that courts have inherent power to change or modify their own injunctions where circumstances have so changed as to make it equitable to do so. *Adams v. Vaill*, 158 Conn. 478, 482.

The events recited above and the potential of harm that appears likely to occur if the injunction continues in its present form requires this court to modify certain provisions of the injunction as granted by Judge Spada. It is unfortunate that in order to try to reduce the possibility of a recurrence of the events of May 22, 1983 that the activities of the plaintiffs will be affected as the evidence is clear that they bear no responsibility in the matter but as Judge Spada balanced the interests of the parties in reaching his decision so this court must also balance the interests of all the parties involved and affected by the events of May 22, 1983.

The police officers testified that interior access to the mall by persons or organizations under a claim of right by the earlier decision in this case present a highly dangerous situation for the reasons stated above. Control is impossible in such a location.

Accordingly, the rights of access and limitations thereon as granted to the plaintiffs by Judge Spada in his judgment of March 2, 1983 will continue in effect with the exception of the designation by the defendants of the single location in the Grand Court of the Mall and paragraphs (4) and (5) as relating thereto. The location of the activities permitted to the plaintiffs is hereby modified and those activities are

hereby relocated to the exterior of the building under the portico located at the middle or east entrance between the Sage Allen and G. Fox entrances or stores on the east side of these premises. The location under the portico shall be as designated by the defendants. In all other respects, the injunction remains in full force and effect.

/s/ Ripley, J.

GEORGE W. RIPLEY